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# ***Easton*: The Birth of Negligence in Real Estate Broker-Purchaser Relationships**

## **I. INTRODUCTION**

In the well publicized case of *Easton v. Strassburger*,<sup>1</sup> a California Court of Appeal held that a listing agent<sup>2</sup> has a duty to conduct a reasonably competent inspection of residential property listed for sale, and to disclose to prospective purchasers all material facts that such an investigation would reveal. The doctrine of joint and several liability further emphasizes the importance of *Easton*. Although the broker in *Easton* was held to be only five percent negligent, he was held liable for the entire amount of the damages awarded by the jury because of the doctrine of joint and several liability.<sup>3</sup>

In light of the ambiguity and far-reaching effects of *Easton*,<sup>4</sup> the legislature responded with Senate Bills 453 and 1406, which clarify and limit the *Easton* holding. The first part of this comment will survey the development of broker liability in residential real estate sales and will then conclude with an examination of *Easton's* impact on broker liability. The second part will examine both senate bills and their applicability in avoiding *Easton* liability. Finally, this comment will discuss the impact of joint and several liability on the court's ruling.

## **II. FACTS**

In May of 1976, Leticia and Gerald Easton purchased a one acre parcel of residential property for \$170,000 from Bill and Faith Strass-

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1. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

2. "[A] listing broker, also called the seller's broker, has a contractual relationship with the vendor." Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interest in Conflict*, 12 GOLDEN GATE U.L. REV. 379, 381 n.10 (1982). In this paper, the terms broker and agent will be used interchangeably.

3. See Gillies, *Broker Liability and E & O Costs Are Major Concerns for Realtors*, CAL. REAL. EST., Jan. 1986, at 18, 19.

4. Because of the possible widespread effect of *Easton*, "[t]he California Association of Realtors, the National Association of Realtors, Merrill Lynch Realty Associates, the Arizona Association of Realtors, the Texas Association of Realtors, and the Hawaii Association of Realtors filed amicus briefs." Caron, *Easton v. Strassburger: A New Era of Broker Litigation*, 3 CAL. REAL PROP. J. 1, 2 (1985). Furthermore, the holding has been extended outside the real estate realm and applied to travel agents. See McCollum v. Friendly Hills, 172 Cal. App. 3d 83, 217 Cal. Rptr. 919 (1985).

burger, unaware that a portion of the property had been built on a landfill. Shortly after the close of escrow in July, there was a massive landslide which caused the foundation of the house to settle, cracked the walls, and warped the doorways of the house. According to expert testimony, the slides were caused by improper engineering and compacting of the soil. As a result of the slide, the value of the property was estimated to be as low as \$20,000 and estimates for the cost of repair were as high as \$213,000.

Agents of Valley Realty represented the Strassburgers, the defendant-sellers, in listing the home for sale through the Multiple Listing Service. Agents of Mason McDuffie represented the Eastons as the plaintiff-purchasers. It is uncontested that there was prior landslide activity on the property that was concealed from Valley Realty by the Strassburgers. However, there is also evidence that agents of Valley Realty had conducted several inspections of the property and were aware of certain "red flags" indicating soil problems. But despite these "red flags," the agents did not have the soil tested for stability and also failed to warn the purchasers of any potential soil problems.

The Eastons brought suit against the Strassburgers, Valley Realty,<sup>5</sup> and three other named defendants.<sup>6</sup> The jury returned a special verdict for \$197,000 based on simple negligence. Under comparative negligence principles, the negligence was apportioned as follows: sixty-five percent against the seller, twenty-five percent against the builders, five percent against Valley Realty, and five percent against Mason-McDuffie, a non-party. Valley Realty appealed, arguing that the jury instruction which stated that a real estate agent was under a duty to investigate and disclose material facts affecting the property was incorrect.

On February 22, 1984, the First District, Division Two of the California Court of Appeal, upheld the lower court's decision. It created a new duty running from the seller's agent to the purchaser and held "that the duty of a real estate broker, representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an inves-

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5. Valley Realty was originally charged with intentional misrepresentation, negligent misrepresentation, and concealment. Caron, *supra* note 4, at 1. During the trial, all causes of action were voluntarily dismissed except for negligent misrepresentation, and the court also permitted the plaintiff to submit a jury instruction based on simple negligence. *Id.*

6. These defendants, San Ramon Builders, George Sauer, and H.M. Bull, were being sued solely for negligent construction. *Easton v. Strassburger*, 152 Cal. App. 3d 90, 97, 199 Cal. Rptr., 383, 386 (1984).

tigation would reveal."<sup>7</sup>

On April 2, 1984, a petition for hearing was filed with the California Supreme Court by Valley Realty.<sup>8</sup> In a 5-2 decision, the Supreme Court refused to hear the case.<sup>9</sup>

### III. EXPANDING BROKER LIABILITY

At common law, real estate sales were judged by the doctrine of caveat emptor,<sup>10</sup> and relief was afforded to purchasers only on the basis of fraud or deceit.<sup>11</sup> Slowly, courts began to move away from this antiquated doctrine and began to protect the "innocent" purchaser. Presently, we are in a "growing era of consumerism,"<sup>12</sup> and courts are affording the residential home purchaser, in what may well turn out to be the single largest purchase of his life, greater protection by increasing the duty real estate brokers owe to him.<sup>13</sup>

In today's market, real estate agents are licensed professionals who are held in a position of trust by home purchasers.<sup>14</sup> In a nationwide study commissioned by the Federal Trade Commission (FTC), the discrepancy between purchaser expectation of the purchaser-broker fiduciary relationship and the current status of the law was re-

7. *Id.* at 102, 199 Cal. Rptr. at 390.

8. Caron, *supra* note 4, at 2.

9. *Id.*

10. *Green v. Superior Court*, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1171-72, 111 Cal. Rptr. 704, 707-08 (1974) ("[U]nder traditional common law rules, the landlord owed no duty to place leased premises in a habitable condition and no obligation to repair . . ."). See also *Sanders v. Stevens*, 23 Ariz. 370, 376, 203 P. 1083, 1085 (1922) (false representations as to the lowest price that the seller will accept does not give rise to an action for fraud). Caveat emptor is literally defined as "[l]et the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

11. See *infra* notes 39-57.

12. Jacobson, *Broker's Liability for Sale of Defective Homes: The Decline of Caveat Emptor*, 52 L.A.B.J. 346, 353 (1977). See also *Tennant v. Lawton*, 26 Wash. App. 701, 706, 615 P.2d 1305, 1309-10 (1980) (a broker has a duty to take reasonable steps to avoid disseminating false information to the buyer and to confirm or refute material facts of which he is aware). See generally Bearman, *Caveat Emptor in Sales of Realty—Recent Assault Upon the Rule*, 14 VAND. L. REV. 541 (1961); McNall & Vincent, *Caveat Venditor Comes of Age In Alaska—A Plaintiff's Guide to Defective Home Litigation*, 11 UCLA-ALASKA L. REV. 57 (1981); Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439 (1960).

13. See *supra* note 12 and accompanying text.

14. See *Sawyer Realty v. Jarvis Corp.*, 89 Ill. 2d 379, 385-86, 432 N.E.2d 849, 851-52 (1982) cited in Peterson, *Tort Claims by Real Estate Purchasers Against Sellers and Brokers: Current Illinois Common Law and Statutory Strategies*, 1983 S. ILL. U.L.J. 161, 176-77 (1983) (brokers occupy a position of trust with the purchasers with whom they are dealing and that this does not undermine the fiduciary duty from broker to seller).

vealed.<sup>15</sup> Fifty-seven percent of the purchasers polled felt that the listing agent with whom they dealt represented their interests.<sup>16</sup> When two brokers were involved in the transaction, a listing agent and a cooperating broker,<sup>17</sup> over seventy percent of the purchasers polled believed that the cooperating broker represented them.<sup>18</sup>

The study further revealed three distinct problems that the purchaser faces: "‘non-disclosure to the buyer of the broker’s position, under-representation, and lack of legal responsibility of the broker to the buyer.’"<sup>19</sup> In order to rectify these problems, courts have imposed liability on real estate agents by creating implied agencies between the real estate broker and the purchaser,<sup>20</sup> and by expanding the duties that brokers owe to those purchasers.<sup>21</sup> In California, the pinnacle in home buyer protection was reached when *Easton* was decided.<sup>22</sup>

### A. Agency Requirements and Fiduciary Duties

As stated above, courts have begun to impose broker-purchaser liability via principles of agency and fiduciary duties. *Easton* continued this trend in California by requiring listing agents to conduct a competent inspection of residential property listed for sale and to disclose to prospective purchasers all material facts that would affect the sale. As such, it is necessary to discuss both agency relationships and fiduciary duties.

#### 1. Agency

The noncontractual rights and liabilities of a real estate broker are governed by the Real Estate Commission, by the duty of care im-

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15. Comment, *The Real Estate Broker's Fiduciary Duties: An Examination of Current Industry Standards and Practices*, 12 PEPPERDINE L. REV. 145, 155-56 (1984) (citing B. BROWN & E. GREEN, *THE ROLE OF THE BROKER IN RESIDENTIAL REAL ESTATE TRANSACTIONS* 3 (1979) ("Report to the FTC on the status of agency law as it affects the role of residential real estate brokers")).

16. Comment, *supra* note 15, at 157-58 (citing B. BROWN & E. GREEN, *supra* note 15, at buyer questions 46a, 46b)).

17. In a real estate transaction, a "cooperating broker brings a prospective buyer to the seller in expectation of sharing the commission if a sale is consummated." Comment, *supra* note 2, at 381 n.10. The broker's fiduciary obligations lie with the seller and *not* the purchaser. *Id.* at 385 n.35.

18. Comment, *supra* note 15, at 157-58 (citing B. BROWN & E. GREEN, *supra* note 15, at buyer questions 46a, 46b)).

19. Comment, *supra* note 15 at 155-56 (quoting B. BROWN & E. GREEN, *supra* note 15, at 3).

20. See Peterson, *supra* note 14, at 176-77.

21. See *supra* note 12 and accompanying text.

22. California courts have been among those taking the lead in imposing duties on sellers and brokers to disclose material facts relevant to a real estate transaction. See Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1, 25-27 (1985).

posed on licensed experts, and by the general principals of agency.<sup>23</sup> In order for an agency relationship to arise, one person, the agent, must agree with another, the principal, to represent him in dealings with third parties.<sup>24</sup> This agreement may be either written or oral, and it may arise by implication of the law.<sup>25</sup> Moreover, little or no formal requirements are needed to create an agency relationship and, as such, conduct of the parties is sufficient to establish the principal-agent relationship.<sup>26</sup>

Once an agency relationship is established, the fiduciary duty that is owed by the agent to the principal is that of honesty, loyalty, and due care.<sup>27</sup> Further, courts now seem willing to go a step further and dispose of the agency requirement altogether if it will work an injustice on a residential home purchaser.<sup>28</sup> This trend places real estate

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23. See *Walters v. Marler*, 83 Cal. App. 3d 1, 35, 147 Cal. Rptr. 655, 676 (1978); see also T. GORDON, CALIFORNIA REAL ESTATE LAW 234 (1980); see generally H. MILLER & M. STARR, 1 CURRENT LAW OF CALIFORNIA REAL ESTATE § 4:4 (rev. ed. 1975); W. SEAVEY, HANDBOOK ON THE LAW OF AGENCY 234-57 (1964).

24. See T. GORDON, *supra* note 23, at 228; REGENTS OF THE UNIVERSITY OF CALIFORNIA CONTINUING EDUCATION OF THE BAR, REAL ESTATE BROKER PRACTICE 86 (1981) [hereinafter REGENTS]; Comment, *supra* note 2, at 384. See generally CAL. CIV. CODE § 2295 (West 1985).

25. "An ostensible agency (an agency implied by law) may arise when the principal negligently or intentionally causes a third person reasonably to believe that another is his agent. In this situation . . . the law prevents . . . the principal from denying the creation of an agency relationship." T. GORDON, *supra* note 23, at 229. See *Skopp v. Weaver*, 16 Cal. 3d 432, 439, 546 P.2d 307, 312, 128 Cal. Rptr. 19, 24 (1976) (an express statement is not essential to give rise to an agency agreement); *Bealer v. West Am. Fin. Co.* 201 Cal. App. 2d 702, 20 Cal. Rptr. 190 (1962) (a broker's duty of confidentiality to the seller begins before the execution of the listing agreement). See generally CAL. CIV. CODE § 2300 (West 1985).

26. An agency relationship may be created by an oral agreement and does not fall within the statute of frauds. REGENTS, *supra* note 24, at 86-87.

27. See *Batson v. Strehlow*, 68 Cal. 2d 662, 441 P.2d 101, 68 Cal. Rptr. 589 (1968); 3 D. AUGUSTINE & S. ZARROW, CALIFORNIA REAL ESTATE LAW & PRACTICE § (MB) 61.04 (1985). See generally Currier, *Finding The Broker's Place in The Typical Residential Real Estate Transaction*, 33 U. FLA. L. REV. 655 (1981).

A real estate broker's duty to his seller corresponds to the duty a trustee owes a beneficiary. See, e.g., *Smith v. Zak*, 20 Cal. App. 3d 785, 98 Cal. Rptr. 242 (1971); *Loughlin v. Idora Realty Co.*, 259 Cal. App. 2d 619, 66 Cal. Rptr. 747 (1968); *Sands v. Eagle Oil & Refining Co.*, 83 Cal. App. 2d 312, 188 P.2d 782 (1948); *Anderson v. Thacher*, 76 Cal. App. 2d 50, 172 P.2d 533 (1946). When good faith is called into question, there is a rebuttable presumption against the agent. *Pepper v. Underwood*, 48 Cal. App. 3d 698, 715, 122 Cal. Rptr. 343, 356 (1975) (citing *Timmsen v. Olsen, Inc.*, 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359, 366 (1970)).

28. Comment, *supra* note 15, at 157, 168 (courts have been willing to impose a duty of "honesty and good faith" on brokers toward purchasers, even in the absence of a fiduciary relationship on the basis of "public policy."). See also Note, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978).

agents in a dilemma. With increasing broker liability to purchasers, do brokers owe a fiduciary duty to the seller or the purchaser?

Generally, the broker is held to be the agent of the first person who employs him, usually the seller.<sup>29</sup> Nonetheless, a broker may unknowingly become the agent for the adverse party.<sup>30</sup> For example, in *Wright v. Lowe*,<sup>31</sup> the real estate broker was held to be the purchaser's agent with regard to the conveyance of a counteroffer. In *Whiteman v. Leonard*,<sup>32</sup> the purchaser's agent became the seller's agent for the purpose of conveying escrow instructions. These cases illustrate the juxtaposition with which a broker is faced. In order to correct this problem, real estate law and general agency principles have held that a broker must act "fairly and honestly with all parties" involved in the transaction.<sup>33</sup>

As can be seen from the above examples, the delineation of those to whom the real estate broker owes a duty, the buyer or the seller is now, more than ever, clouded with ambiguity. Furthermore, given the fact that today's courts are upholding actions brought by purchasers against listing agents even in the absence of a principal-agent relationship,<sup>34</sup> the extent to which a real estate broker must act "fairly and honestly" with home purchasers has become the focal point that governs liability.<sup>35</sup> Therefore, it is necessary to examine the duty that a real estate agent now owes to a prospective purchaser.

## 2. Duty of Care

Inherent in a fiduciary relationship is the understanding that an agent may not gain a financial advantage over his principal through fraud, concealment, or misrepresentation.<sup>36</sup> Because the fiduciary bonds between the listing agent and the seller now extend to the purchaser, these same principles have been carried into the scope of the listing agent-purchaser relationship. Modernly, a broker violates his duty of "good faith and honesty" toward the buyer not only if he

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29. *Wolf v. Price*, 244 Cal. App. 2d 165, 173, 52 Cal. Rptr. 889, 894 (1966).

30. T. GORDON, *supra* note 23, at 231.

31. 140 Cal. App. 2d 891, 896-97, 296 P.2d 34, 37 (1956).

32. 189 Cal. App. 2d 373, 376-77, 11 Cal. Rptr. 211, 213 (1961).

33. T. GORDON, *supra* note 23, at 236.

34. See Peterson, *supra* note 14, at 161.

35. In Illinois, the "critical issue of duty to nonclient plaintiffs has apparently been resolved." *Id.* at 176. There, "[i]n *Sawyer Realty v. Jarvis Corp.*[]" the court rejected an argument that in the absence of a fiduciary relationship of principal and agent, brokers have no obligation to disclose material facts to purchasers with whom they are negotiating." *Id.* at 176-77 (citing *Sawyer Realty v. Jarvis Corp.*, 89 Ill. 2d 379, 432 N.E.2d 849 (1982)). In fact, it can be argued that some if not all of the broker's commission comes from the purchase price paid by the buyer. This should, in turn, logically give rise to a fiduciary relationship. Nonetheless, courts rarely adopt this reasoning. See Comment, *supra* note 15, at 155.

36. Comment, *supra* note 2, at 384.

fraudulently induces the third party into making the purchase, but also if he negligently misrepresents facts material to the transaction.<sup>37</sup> And with the burgeoning of *Easton*, a broker faces liability based on simple negligence.<sup>38</sup> As such, an overview of the doctrines of fraud and negligence will be presented.

#### a. Fraud

A fraudulent act is one that is intended to deceive another.<sup>39</sup> Within this sphere are nondisclosures, concealments, and misrepresentations of material facts.<sup>40</sup> Moreover, fraud has grown to encompass negligent misrepresentations as well.

Nondisclosure and concealments are very similar in nature and often liability can be based on either of the two doctrines. A nondisclosure is the failure to reveal material facts in the absence of affirmative concealment.<sup>41</sup> For example, in *Lingsch v. Savage*,<sup>42</sup> the court held that when a broker possesses knowledge of material facts affecting the desirability of property, he is under an affirmative duty to disclose them to the purchaser unless they are readily apparent to the purchaser.<sup>43</sup> Moreover, a broker is obligated to disclose any fraudulent acts by his principal.<sup>44</sup>

A concealment, on the other hand, is the affirmative act of hiding defects to prevent their discovery.<sup>45</sup> However, what comprises an af-

37. H. DAVEY & H. MERCER, *REAL ESTATE PRINCIPLES IN CALIFORNIA* 94 (1981).

38. See *Easton*, 152 Cal. App. 3d at 98, 199 Cal. Rptr. at 386. For cases that have arisen as a result of *Easton*, see *infra* text accompanying notes 94-99.

39. T. GORDON, *supra* note 23, at 236.

40. *Id.*

41. *State v. Watson*, 145 Kan. 792, 794, 67 P.2d 515, 517 (1937).

42. 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963).

43. *Id.* at 736, 29 Cal. Rptr. at 205. See also *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976) (broker has a duty to disclose material facts affecting the value of the property). The most common example of nondisclosure is the failure to disclose termite problems. See, e.g., *Maples v. Porath*, 638 S.W.2d 337 (Mo. Ct. App. 1982); *Saporta v. Barbagelata*, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963).

44. *Willig v. Gold*, 75 Cal. App. 2d 809, 171 P.2d 754 (1946). See also *Williams v. Benson*, 3 Mich. App. 9, 141 N.W.2d 650, 656 (1966) cited in *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 190, 183 Cal. Rptr. 881, 892 (1982) ("Purchasers of a motel who had been advised by [the] vendor that there had been termite infestation but [it was] considered [that the] trouble had been remedied by treatment had a duty to disclose [these] facts to subpurchaser, and silence constituted fraud").

When a broker violates his duty, his liability is coextensive with the seller. Each will be jointly and severally liable for the nondisclosure. See *REGENTS*, *supra* note 24, at 112. For a further discussion of the doctrine of joint and several liability and its implications on real estate transactions, see *infra* text part V and notes 114-28.

45. T. GORDON, *supra* note 23, at 237. See generally CAL. CIV. CODE § 1710 (West 1985). See *Cooper v. Jevne*, 56 Cal. App. 2d 860, 128 Cal. Rptr. 724 (1976). Cf. *Merrill v.*



firmative act is not exactly clear. Nonetheless, it has been held that the mere nondisclosure of structural defects is sufficient for liability.<sup>46</sup> Furthermore, as with nondisclosures, the broker is under an affirmative duty to disclose the fraudulent acts of the seller.<sup>47</sup> Therefore, any concealment of a material fact may result in liability.

Broker liability to purchasers may also be based on the theory of misrepresentation. Misrepresentations can take on two forms, intentional or negligent. "An intentional misrepresentation is an affirmative . . . statement of a material fact that the broker knows is untrue."<sup>48</sup> In *Oakes v. McCarthy*,<sup>49</sup> a broker was never told to withhold information as to the existence of fills or drainage problems on the land, and was further affirmatively instructed to make disclosures to anyone who asked.<sup>50</sup> Nonetheless, as to those who did not ask, the broker saw no reason to tell them, and further *made representations* that the house was constructed in compliance with Federal Housing Authority requirements and had passed FHA inspection.<sup>51</sup> The court held that the evidence supported a claim for *misrepresentation* and fraudulent concealment.<sup>52</sup> It reasoned that an inexperienced purchaser could rely on the representations of an experienced real estate agent.<sup>53</sup>

Finally, a claim for fraud may also be based on a negligent misrepresentation even though the statement was not made with an intent to deceive.<sup>54</sup> A negligent misrepresentation is a false statement by one believing the statement to be true but who had no reasonable grounds for such belief.<sup>55</sup> In *Stone v. Farnell*,<sup>56</sup> the Ninth Circuit

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Buck, 58 Cal. 2d 552, 562, 375 P.2d 304, 310, 25 Cal. Rptr. 456, 462 (1962) (stating that a real estate agent who undertakes to show a house for the purpose of renting it is under a duty to warn the lessee of concealed danger on the premises of which he is aware.) See generally CAL. CIV. CODE § 1710 (West 1985).

46. *Cooper*, 56 Cal. App. 3d at 866, 128 Cal. Rptr. at 727.

47. See *Willig v. Gold*, 75 Cal. App. 2d 809, 171 P.2d 754 (1946).

48. T. GORDON, *supra* note 23, at 237. See generally CAL. CIV. CODE §§ 1572, 1710 (West 1985).

49. 267 Cal. App. 2d 231, 73 Cal. Rptr. 127 (1968).

50. *Id.* at 242, 73 Cal. Rptr. at 134.

51. *Id.* at 260, 73 Cal. Rptr. at 145.

52. *Id.* at 261, 73 Cal. Rptr. at 145.

53. *Id.* In order to determine whether a misrepresentation occurred, considerable weight should be given to the level of experience the purchaser has in real estate transactions. *Feckenscher v. Gamble*, 12 Cal. 2d 482, 496, 85 P.2d 885, 891 (1938). Moreover, although puffing—a statement of opinion on which a reasonable buyer would not rely—has traditionally not been actionable, in today's trend of broker liability, an agent should be extremely cautious of any affirmative statements he makes, unless they clearly constitute puffing. For example, "This is the *best buy* in town." See *Cooper v. Jevne*, 56 Cal. App. 3d 860, 865-66, 128 Cal. Rptr. 724, 726-27 (1976) (statements which are clearly opinion cannot constitute actionable fraud); see generally T. GORDON, *supra* note 23, at 237.

54. See *infra* note 56 and accompanying text.

55. *Robert v. Ball*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); see generally CAL. CIV. CODE §§ 1572, 1710 (West 1985).

Court of Appeals held that under California law a cause of action for fraud would lie even in the absence of an intent to deceive—*scienter*—so long as there were no reasonable grounds for making the statement.<sup>57</sup> As such, a cause of action for negligent misrepresentation is firmly established in California real estate law, and any representation which is based on fraud will be actionable.

#### b. Negligence

As concern for buyer protection in residential real estate transactions grows, courts are now beginning to open the door to liability based on negligence. It was on this theory that the court in *Easton* rested its holding, and it is in accord with modern thinking which holds that a member of the public should reasonably be able to rely on the expertise of professional and semi-professional groups.<sup>58</sup> With this new doctrine now expanding into broker-purchaser relationships, *Easton* is holding a sword of Damocles over brokers to make a competent investigation of residential real estate prior to the sale.

Negligence can be defined as the lack of due care that a reasonable person would exercise under similar circumstances.<sup>59</sup> In *Merrill v. Buck*,<sup>60</sup> the California Supreme Court foreshadowed the birth of negligence in broker-purchaser relationships. There, the court held that real estate agents who had undertaken to show a house to a potential lessee were under a duty to warn her of any concealed dangers on the property of which they were aware *and which might be foreseen to cause her injury* if she rented the premises.<sup>61</sup> Although the court admitted that this case was "one without exact precedent," it felt that it was reasonable to impose this duty on the brokers because they showed the house in the regular course of their business and for the purpose of earning a commission.<sup>62</sup>

As can be seen in *Merrill*, the focal point that determines the liability of a broker, under a negligence theory, depends upon the duty

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56. 239 F.2d 750 (9th Cir. 1957).

57. *Id.* at 754.

58. Levine, *Real Estate Malpractice: Areas of Liability*, TRIAL, Jan. 1982, at 33. Furthermore, because it is often difficult to recover from the seller and "because the real estate broker is highly visible, continues to be in business, and is easily reached by service of process, he often becomes the eventual target of a lawsuit." Jacobson, *supra* note 12, at 346.

59. McKay v. Hedger, 139 Cal. App. 266, 34 P.2d 221 (1934). See generally CAL. CIV. CODE § 1714 (West 1985).

60. 58 Cal. 2d 552, 375 P.2d 304, 25 Cal. Rptr. 456 (1962).

61. *Id.* at 562, 375 P.2d at 310, 25 Cal. Rptr. at 462.

62. *Id.*

the court is willing to impose on him. As such, the essential element that must be proved in a negligence cause of action against an agent is that of duty.

### B. *Easton Liability*

Although *Easton* is the landmark case establishing negligence as a basis for broker liability in California, the court failed to address three issues upon which this new duty rests. These issues are as follows: the standard of care that an agent must possess, the scope of the investigation, and any conflict of interest that this duty imposes on the broker-seller fiduciary relationship.<sup>63</sup> In order to clarify *Easton's* place in California real estate law, these issues will be discussed.

#### 1. Duty of Care

In *Easton v. Strassburger*,<sup>64</sup> the court articulated a new duty, running from the listing agent to the home purchaser, upon which a cause of action for negligence can be maintained.<sup>65</sup> The court held that a listing agent has an affirmative duty to conduct a reasonably diligent inspection of the premises for sale and to disclose to the buyer facts materially affecting the value or desirability of the property.<sup>66</sup> Moreover, this was the first California appellate case to impose such a far-reaching duty on the listing agent to investigate and disclose material facts which he should have known.<sup>67</sup>

The court in *Easton* found precedent for its holding in two different areas of law. The court "drew an analogy between the real estate action and two fraud cases, *Cooper v. Jevne* . . . and *Lingsch v. Savage* . . . [which] require a broker to disclose defects he knows of but which are unknown and unobservable to the buyer."<sup>68</sup> In order to extend these holdings, the court drew support from article 9 of the Code of Ethics of the National Association of Realtors.<sup>69</sup> It states that "[t]he Realtor shall avoid exaggeration, misrepresentation, or concealment of pertinent facts [, and that] he has an affirmative obli-

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63. Caron, *supra* note 4, at 2.

64. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

65. Caron, *supra* note 4, at 2.

66. *Easton*, 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390. The court went on to state that where "the cause of action is for negligence, not fraud, it need not be alleged or proved that the broker had actual knowledge of the material facts in issue nor that such facts were accessible only to him or his principal and that he therefore had constructive knowledge thereof." *Id.* at 103, 199 Cal. Rptr. at 390.

67. *Id.* at 99, 199 Cal. Rptr. at 388. See also Galante, *Court Widens Home Brokers' Duty*, 6 NAT'L L.J. 3, 3 (1984).

68. Galante, *supra* note 67, at 10 (citing *Cooper v. Jevne*, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963)); see *Easton*, 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390.

69. *Easton*, 152 Cal. App. 3d at 101-02, 199 Cal. Rptr. at 390-91.

gation to discover adverse factors that a reasonably competent and diligent investigation would disclose."<sup>70</sup> Notwithstanding this ethical standard, it can be argued that the decision rests simply on policy considerations.

The policy justifications for holding a listing agent liable on a negligence theory stem from the agent's position as a licensed expert who is held to a professional standard of care.<sup>71</sup> It has been argued that a member of the public should reasonably be allowed to rely on the representations of a broker because of his position as a professional.<sup>72</sup> Furthermore, the court stated that this increased duty was not onerous because the listing agent is usually in the best position to provide reliable information to the buyer, and because it is relatively easy for him to comply with this new standard of care.<sup>73</sup> However, the court failed to recognize that a broker often relies on the seller to disclose latent defects and that he is usually not "a licensed expert in any of the structural components of . . . property."<sup>74</sup> Nonetheless, when determining upon whom a duty should rest, courts generally weigh the factors in favor of an inexperienced consumer and against a licensed professional.

The following example illustrates this point. Because a real estate appraiser gathers, prepares, analyzes, and determines the value of property, he is held to a professional standard of care and may be liable to the purchaser for negligently performing his duties.<sup>75</sup> There are also cases holding engineers,<sup>76</sup> architects,<sup>77</sup> lawyers,<sup>78</sup> and insur-

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70. Caron, *supra* note 4, at 5 (citing National Assoc. of Realtors, Interpretations of the Code of Ethics, art. 9 (7th ed. 1978)); *Easton*, 152 Cal. App. 3d at 101-02, 199 Cal. Rptr. at 390-91.

71. *Easton*, 152 Cal. App. 3d at 98, 199 Cal. Rptr. at 387. See also *Tennant v. Lawton*, 26 Wash. App. 701, 615 P.2d 1305 (1980); *Brady v. Carman*, 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960); *Richards Realty Co. v. Real Estate Comm'r*, 144 Cal. App. 2d 357, 300 P.2d 893 (1956).

72. Levine, *supra* note 58, at 33.

73. *Easton*, 152 Cal. App. 3d at 101-02, 199 Cal. Rptr. at 389. See also *Tennant*, 26 Wash. App. at 706, 615 P.2d at 1309-10 (the broker "is in a unique position to verify critical information given [to] him by the seller."). Further, the *Easton* court stated that in a residential real estate transaction, the listing agent may inadvertently lead the buyer to believe that he represents his interests. *Easton*, 152 Cal. App. 3d at 101, 199 Cal. Rptr. at 389 (citing Sinclair, *The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B. J. 260, 263-64 (1981)).

74. Caron, *supra* note 4, at 7.

75. *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973).

76. *E.g.*, *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973).

77. *Id.*

78. *Holland v. Lawless*, 95 N.M. 490, 623 P.2d 1004 (1981).

ers<sup>79</sup> liable to purchasers of real property. Therefore, holding a broker liable for negligence seems in accord with the duty owed by other professional groups.

Finally, the court's decision to extend broker liability in *Easton* can be summed up in the following statement:

If a broker were required to disclose only known defects, but not also those that are reasonably discoverable, he would be shielded by his ignorance of that which he holds himself out to know. . . . Such a construction would not only reward the unskilled broker for his own incompetence, but might provide the unscrupulous broker the unilateral ability to protect himself at the expense of the inexperienced and unwary who rely upon him.<sup>80</sup>

With this statement, the court firmly established broker liability in California.

## 2. Scope of the Investigation

Justice Kline stated that where a cause of action is based on simple negligence "the undisclosed material facts need not be either actually known by the broker or accessible *only* to him or his principal."<sup>81</sup> As such, the listing agent is required to disclose facts that are reasonably discoverable through a diligent investigation. However, the court did not precisely define the scope of the investigation. It did state that it requires "something more than a casual visual inspection and a general inquiry of the owners."<sup>82</sup>

Because the court did not adequately define the scope of a listing agent's duty to conduct a diligent investigation, guidelines for an agent to follow are difficult to ascertain. Even so, the court did state that only material facts need be disclosed. Therefore, by discussing what constitutes materiality in a residential real estate transaction, guidelines for a broker to follow may be inferred.

In a real estate transaction, facts are material if they *might* influence the principal's decision to enter into a transaction.<sup>83</sup> However, facts are not considered material for purposes of disclosure if they are known by the buyer or readily observable by him.<sup>84</sup>

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79. *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).

80. *Easton v. Strassburger*, 152 Cal. App. 3d 90, 100, 199 Cal. Rptr. 383, 388 (1984).

81. *Id.* at 99 n.3, 199 Cal. Rptr. 388 n.3 (emphasis in original).

82. *Id.* at 105, 199 Cal. Rptr. at 392. See also Caron, *supra* note 4, at 2 (a listing agent now has a duty to disclose facts that are reasonably discoverable).

83. T. GORDON, *supra* note 23, at 235. See generally CAL. CIV. CODE § 2020 (West 1985). Although the issue of materiality defined here is that of agent to principal, the same definition should govern materiality when the relationship involved is listing agent to purchaser.

84. See e.g., *Cooper v. Jevne*, 56 Cal. App. 860, 866, 128 Cal. Rptr. 724, 727 (1976) (material facts must be disclosed only if they are not known to or within the diligent observation of the buyer); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735-36, 29 Cal. Rptr. 201, 204 (1963) (facts not known or within the diligent attention of the buyer); *Clauser v. Taylor*, 44 Cal. App. 2d, 453, 454, 112 P.2d 661, 662 (1941) (facts are material only when apparent to the vendee).

In *Easton*, the court adopted an expanded definition of materiality. The court defined material facts as those "affecting the value or desirability of the property."<sup>85</sup> However, it did not limit its holding to facts that are observable by the buyer because to hold otherwise might reward an incompetent or unscrupulous broker at the expense of an inexperienced purchaser.<sup>86</sup>

Although the court adopted an expanded definition of materiality, it did limit its holding in three ways. First, the court acknowledged that there will be cases where the defect is "so clearly apparent" that the broker, as a matter of law, will not be accountable for failing to disclose it.<sup>87</sup> Second, the holding is limited to an "inspection of the property for the purpose of disclosing present facts."<sup>88</sup> Third, the court will continue to allow a broker to seek indemnity against a seller who affirmatively misrepresents his property.<sup>89</sup>

### 3. Conflict of Interest

Although the court recognized the need for home purchaser protection, it failed to address the obvious conflict of interest that a broker faces as the result of its holding. Perhaps the best example illustrating the dilemma realtors are facing is described in the case of *Hobbs v. Eichler*,<sup>90</sup> which dealt with the conflict of interest facing securities brokers. The court stated:

[T]his [case] is a classic example of the conflict of interest which exists in the securities industry and is at the heart of the circumstances which resulted in the 'hobbling' of Mrs. Hobbs. On the one hand, brokers act as investment advisers to their clients. On the other hand, they are salespersons, dependent upon their brokerage commissions for a livelihood. Commissions are received only when customers engage in transactions. . . .

"Under this compensation system few brokers are immune to the temptation to consider their financial interest from time to time while they are advising clients. Being at once a salesman and counselor is too much of a burden for most mortals."<sup>91</sup>

Similar to the problem facing the "hobbling" of Mrs. Hobbs, real

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85. *Easton*, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 391 (quoting trial court jury instructions).

86. *Id.* at 100, 199 Cal. Rptr. at 388. See also Galante, *supra* note 67 at 10.

87. *Easton*, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 391.

88. Caron, *supra* note 4, at 4.

89. *Easton*, 152 Cal. App. 3d at 110-11, 199 Cal. Rptr. at 396. See also Caron, *supra* note 4, at 6. Nonetheless, the seller may be judgment proof because he has reinvested in another home, which will likely be homesteaded, or because he is beyond the subpoena power of the court. In such a situation, the broker will bear the burden of the entire judgment. Jacobson, *supra* note 12, at 346.

90. 164 Cal. App. 3d 174, 210 Cal. Rptr. 387 (1985).

91. *Id.* at 204, 210 Cal. Rptr. at 405 (citations omitted).

estate brokers are faced with inherent conflicts which arise in their profession. In the 1980's, the issue of dual representation has become one of the most critical problems facing real estate agents.<sup>92</sup> And with the holding in *Easton*, which creates a dual agency relationship between the listing agent and the seller and the listing agent and the purchaser in every residential real estate transaction, the problem of dual representation facing the real estate industry is only being compounded. Yet, the logic behind the holding can be easily extrapolated from the case. In *Easton*, the court simply felt that the risks arising out of dual agency relationships should be borne by the licensed real estate agent and *not* by the inexperienced home purchaser.<sup>93</sup>

### C. *The Impact of Easton*

The holding in *Easton* has caused a variety of problems for the real estate industry—ranging from defining the new standard of care to creating an inherent conflict of interest in every residential real estate transaction. But beyond the issues discussed above, there are other issues just as telling, that arise out of the case. First, the broker has traditionally relied on the seller for information regarding latent defects in the property. With the advent of *Easton*, sellers may now withhold information about their property for fear that any disclosure will result in a costly investigation.<sup>94</sup> Second, a broker overzealous in making disclosures to the buyer may face a suit by the seller.<sup>95</sup> Third, *Easton* may become a conduit for a variety of potential lawsuits. For example, "claims [which allege] 'material facts' that a broker 'should have known' include: the presence of barking dogs in the neighborhood at night; the blowing of the wind on a hilltop . . . ; [and] the fact that a toilet bowl fills up with hot water rather than cold water resulting in higher utility bills."<sup>96</sup> Finally, because of the tort principle of joint and several liability, a slightly negligent broker is potentially liable for large damage awards.<sup>97</sup>

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92. Comment, *supra* note 2, at 379 (citing 1 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 4:18 (Supp. 1981)). The problem of dual agency is particularly acute in the area of sub-agency relationships arising out of multiple listing agreements. This is because the cooperating broker, who brings a prospective purchaser to the seller, is actually a sub-agent of the listing broker and has the same financial interest as the listing agent in closing the deal at a high price. Comment, *supra* note 2, at 381 n.11, 387. See generally CAL. CIV. CODE §§ 2349, 2351 (West 1985).

93. See *Easton*, 152 Cal. App. 3d at 101, 199 Cal. Rptr. at 389 ("[T]he broad definition of the duty we adopt is supported not simply by the magnitude of the benefit thus conferred on buyers but also by the relative ease with which the burden can be sustained by brokers."). See also Comment, *supra* note 2, at 404.

94. Caron, *supra* note 4, at 6.

95. *Id.* at 7.

96. *Id.* at 2.

97. For a discussion of the doctrine of joint and several liability in relation to *Easton*, see *infra* Part V and notes 114-28.

Perhaps, the *Easton* court should have followed the decision in *Provost v. Miller*,<sup>98</sup> a case decided by the Supreme Court of Vermont. In *Provost*, the plaintiff-purchasers brought suit against the seller and the real estate broker for damages sustained to the house when the wall of the basement collapsed shortly after the sale. At the trial, the real estate broker was found guilty of negligent misrepresentation. On appeal, the court agreed that the judge incorrectly instructed the jury on the broker's duty to make an independent investigation for the purpose of verifying statements made by the seller. The court held that the real estate broker was an agent of the seller and that:

[A] . . . broker or agent is guilty of negligent misrepresentation *only* if he or she passes information from a seller to a buyer that he or she knows or has reason to know may be untrue. Real estate brokers and agents are marketing agents, not structural engineers or contractors. They have no duty to verify independently representations made by a seller unless they are aware of facts that "tend to indicate that such representation[s] are false."<sup>99</sup>

Nonetheless, the California Court of Appeal felt that greater protection was owed to the residential home buyer and created a cause of action against a listing agent for simple negligence. But, because of the undefined parameters of the holding, the California legislature passed two bills, Senate Bills 453 and 1406, which help define and limit *Easton*.

#### IV. HOW TO AVOID *EASTON*: SENATE BILLS 453 AND 1406

Because of the far-reaching effects of *Easton*, the California legislature responded by passing Senate Bills 453<sup>100</sup> and 1406<sup>101</sup> which define and limit the *Easton* holding. They are important guidelines as

98. 144 Vt. 67, 473 A.2d 1162 (1984).

99. *Id.* at 69-70, 473 A.2d at 1163-64 (citing *Lyons v. Christ Episcopal Church*, 71 Ill. App. 3d 257, 259-60, 389 N.E.2d 623, 625 (1979)) (emphasis added).

100. S. 453, 1985-86 Cong. Sess., Cal. Laws §§ 1, 3-4 (codified as amended at CAL. CIV. CODE § 2079 (West Supp. 1986) (duty to prospective purchaser of residential property) and at CAL. INS. CODE § 11589.5 (West Supp. 1986) (professional insurer cannot exclude coverage of *Easton* liability from its policy)). See generally *Easton v. Strassburger: New Legislation Changes Broker's Duty*, 1985 REAL EST. BULL. 1 (Fall 1985).

101. S. 1406, 1985-86 Cong. Sess., Cal. Laws §§ 1, 3 (codified as amended at CAL. BUS. & PROF. CODE § 10176.5 (West Supp. 1986) and in Chapter 2, Title 4, Part 4, Division 2 of the California Civil Code, relating to real property) (commissioner may investigate and suspend or revoke an agent's license for violation of this article) and at CAL. CIV. CODE § 1102 (West Supp. 1986) (disclosure requirements relating to the transfer of residential property)). See generally *Easton, Nash Bills Signed by Governor*, News a la Cal. A. Realtors, Oct. 25, 1985 at 1.



to the parameters of *Easton* liability and, as such, it is important that brokers have a working knowledge of both bills.

#### A. Senate Bill 453

Senate Bill 453, which became effective January 1, 1986, was drafted to clarify and limit a licensee's duty under *Easton*. It is applicable to both listing agents and cooperating brokers and acknowledges that real estate brokers are not structural engineers or soil experts. Therefore, it imposes on them only "the degree of care that a reasonably prudent real estate licensee would exercise as measured by the knowledge, education, and experience necessary to obtain a real estate license."<sup>102</sup> Further, it imposes several limitations on *Easton*.

First, in order for liability to arise under this article, the transaction must involve a sale, lease-option, installment land contract, or a ground lease coupled with improvements of residential real estate comprising one to four dwelling units. Second, the scope of the investigation is limited solely to a visual inspection of the property and to areas reasonably accessible to such an inspection. The scope of the investigation is further limited to the unit offered for sale, and if the property is a condominium, stock cooperative, or part of a planned unit development, a broker's duty to inspect extends only to the unit itself and *not* the entire complex.

The fourth area of *Easton* that the bill clarifies is the disclosure requirement. Under *Easton*, a broker is required to disclose material facts affecting the value or desirability of property whether or not they are reasonably discoverable by the purchaser.<sup>103</sup> In this bill, the legislature chose to limit disclosure to facts not known or within the diligent observation of the purchaser and, as such, reinstated the purchaser's obligation to use reasonable care to protect himself.<sup>104</sup> Finally, the bill requires that a cause of action, based upon *Easton*, must be brought within a two year period which begins to run from the close of escrow, the date of recordation, or the date of occupancy, whichever occurs first.<sup>105</sup>

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102. Hutchinson, *Legislative Response to Easton: Broker's Duty Exemplified*, 1986 CAL. REAL EST. 14, 14 (quoting S. 453, 1985-86 Cong. Sess., Cal. Laws § 2).

103. *Easton*, 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390.

104. This limitation is logical because it returns the standard to that articulated in the fraud cases of *Lingsch* and *Cooper* upon which the court in *Easton* based its holding. See *id.* at 102, 199 Cal. Rptr. at 390.

105. The bill also provides that a professional liability insurer may not exclude *Easton* liability from its coverage. S. 453, 1985-86 Cong. Sess., Cal. Laws at 11589.5. However, this is only a partial solution to the problem and does not address the real issue, the effect of *Easton* on insurance premiums. See generally Gillies, *Broker Liability and E & O Costs are Major Concerns for Realtors*, 1986 CAL. REAL ESTATE 18 (1986).

## B. Senate Bill 1406

The legislature also passed a second piece of *Easton* legislation, Senate Bill 1406, which became effective January 1, 1987.<sup>106</sup> This bill requires that the seller fill out a specified disclosure form which is then to be verified through the broker's inspection.<sup>107</sup> The disclosure form asks questions ranging from defects in appliances, utilities, and structural components of the house to questions regarding easements, encroachments, building code violations, nuisances or noise problems in the neighborhood, lawsuits affecting the property and, as in *Easton*, landfills and soil problems.<sup>108</sup> The result is that anytime there is an inconsistency between the broker's observations and the questionnaire, a "red flag" rises warning brokers of potential *Easton* liability.<sup>109</sup>

The bill further requires that all disclosures be made in good faith,<sup>110</sup> and it generally places upon the broker obtaining the offer the responsibility of delivering the disclosure statement to the prospective purchaser before title to the property is transferred.<sup>111</sup> However, if the disclosure statement is delivered "after the execution

106. The one year delay is designed to give the public and the real estate industry ample time to educate themselves and conform to the requirements of the bill. Hutchinson, *supra* note 102, at 14. See also Parker, *Legislative Summary*, REAL EST. BULL. (official publication of the California Department of Real Estate) 1 (Winter 1985).

107. For a copy of the disclosure form, see *infra* appendix A.

108. However, this article does not apply to the following:

- (a) Transfers which are required to be preceded by the furnishing . . . of a public report.
- (b) Transfers pursuant to a court order.
- (c) Transfers to a mortgagee by a mortgagor . . . .
- (d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
- (e) Transfers from one co-owner to . . . other co-owners.
- (f) Transfers made to a spouse, or to a person in the lineal line of consanguinity.
- (g) Transfers between spouses resulting from a decree of [divorce] or . . . legal separation or from a property settlement . . . .

. . . .

- (j) Transfers to or from any governmental entity.

S. 1406, 1985-86 Cong. Sess., Cal. Laws at 1102.1.

109. The legislature adopted the position advanced by Martha L. Caron in her article *Easton v. Strassburger: A New Era of Broker Litigation*. See Caron, *supra* note 4, at 3.

110. "For the purposes of this article, 'good faith' means honesty in fact in the conduct of the transaction." S. 1406, 1985-86 Cong. Sess., Cal. Laws at 1102.7.

111. However, if there is more than one broker involved in the transaction, the transferor may shift the responsibility of delivering the disclosure statement away from the selling broker. He may accomplish this by giving other written instructions for delivery. *Id.* at 1102.12(a).

of [the] offer to purchase, the [purchaser] shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer . . . ."<sup>112</sup>

Under this bill, neither a seller nor an agent will be liable for errors or omissions in the disclosure statement if the information given was obtained by the use of ordinary care and the inaccuracy was not known to either party. This bill also recognizes, as does Senate bill 453, that brokers are not experts in all areas of land transactions, and it allows a broker to rely on an opinion or report prepared by a contractor, land surveyor, geologist, structural pest controller, or other similar expert without holding him liable for errors or omissions in the report. Moreover, it holds that even if a person willfully or negligently violates his duty under this article, the transaction will not be invalidated. Nonetheless, he shall be liable for the actual damages suffered by the purchaser.<sup>113</sup>

#### V. THE IMPACT OF JOINT AND SEVERAL LIABILITY ON *EASTON*

"*Easton* simultaneously expanded exposure for . . . brokers who failed to inspect, and focused realtor attention on the issue of joint and several liability."<sup>114</sup> Under this doctrine, persons who act either jointly, concurrently, or successively to cause an indivisible harm are each individually liable for the entire injury.<sup>115</sup> In *Li v. Yellow Cab Company*,<sup>116</sup> the California Supreme Court adopted a "pure" comparative negligence system "under which liability for damages [is] borne by those whose negligence caused [the injury] in direct proportion to their respective fault."<sup>117</sup> However, the court left open the issue of whether joint and several liability would remain viable in Califor-

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112. *Id.* at 1102.2.

113. For further information regarding senate bills 453 and 1406, members of the California Association of Realtors may call the Legal Services Hotline at (213) 739-8282. Hutchinson, *supra* note 102, at 16.

114. Gillies, *supra* note 3, at 18.

115. *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 81, 155 Cal. Rptr. 29, 40, *cert. denied*, 444 U.S. 984 (1979); *Apodaca v. Haworth*, 206 Cal. App. 2d 209, 213, 23 Cal. Rptr. 461, 463 (1962); *Agovino v. Kunze*, 181 Cal. App. 2d 591, 598, 5 Cal. Rptr. 534, 538 (1960). See also Pearson, *Apportionment of Losses Under Comparative Fault Law—An Analysis of the Alternatives*, 40 LA. L. REV. 360, 361 (1980); Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Association v. Superior Court*, 14 LOY. L.A.L. REV. 775, 777 (1981). See generally W. KEATON, PROSSER AND KEATON ON THE LAW OF TORTS 322-24 (5th ed. 1979).

116. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

117. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864. The court further stated that "the contributory negligence of the person injured in person or property [does] not bar recovery, but the damages awarded [are to] be diminished in proportion to the amount of negligence attributable to the person recovering." *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

For a bibliography of articles discussing the principle of comparative negligence in California, see Kunter, *Bibliography: Contribution Among Tortfeasors*, 33 DEF. L.J. 219, 238-39 (1984).

nia.<sup>118</sup> The court affirmatively answered this question in *American Motorcycle Association v. Superior Court*,<sup>119</sup> where it reasoned that a "wronged party should not be deprived of his right to redress."<sup>120</sup> As such, joint and several liability remains a viable doctrine in this state.<sup>121</sup>

However, "problems . . . lurk in the background"<sup>122</sup> of the court's holding. *Easton* is such an example. Here, Valley Realty, while only five percent negligent, was liable for the entire judgment because of the insolvency of the other defendants.<sup>123</sup>

A further effect on realtors will be the problem of obtaining reasonably priced error and omissions insurance.<sup>124</sup> A comparison can be made to the predicament facing the League of California Cities which, because of the doctrine of joint and several liability, has faced increased insurance premiums ranging from three hundred to four hundred percent.<sup>125</sup> As such, the practical effect of joint and several liability on *Easton* may be to force the small commercial realtor out of business.

Despite the apparent difficulties that result from the doctrine of joint and several liability, two areas of reform may aid the realtor.

118. Zavos, *supra* note 115, at 777.

119. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

120. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189 (quoting *Summers v. Tice*, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948)).

121. *Id.* at 582, 578 P.2d at 901, 146 Cal. Rptr. at 184. For cases affirming the holding, see *Paradise Valley Hosp. v. Schollossman*, 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983); *Klemme v. Hoag Memorial Hosp. Presbyterian*, 103 Cal. App. 3d 640, 163 Cal. Rptr. 109 (1980); *Wagner v. State*, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978); *Arbaugh v. Procter & Gamble*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978); *Adams v. Cerritos*, 79 Cal. App. 3d 957, 145 Cal. Rptr. 310 (1978); *Transit Casualty Co. v. Spink Corp.*, 78 Cal. App. 3d 509, 144 Cal. Rptr. 488 (1978).

122. *Schollossman*, 143 Cal. App. 3d at 88, 191 Cal. Rptr. at 532 (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 823, 532 P.2d 1226 (1975)).

123. The inequities are compounded when the plaintiff is negligent or when the plaintiff's negligence is greater than the solvent defendant's negligence. This is especially true when the injury is purely economic in nature, as in most real estate cases, and not a physical injury. For a discussion of the problems involved in a "pure" comparative negligence system when a defendant is insolvent, see *Adams, Settlements After Li: But is it "Fair?"*, 10 PAC. L.J. 729 (1979) and *Miller, Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835, 862-63 (1983).

Nonetheless, the court's preference for a negligent plaintiff over a negligent defendant can be understood. As the court stated, "[T]he fact remains that insofar as the plaintiff's conduct creates only risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious." *American Motorcycle*, 20 Cal. 3d at 590-91, 578 P.2d at 906, 146 Cal. Rptr. at 189.

124. See *Gillies, supra* note 3, at 18.

125. *Granelli, The Attack on Joint and Several Liability*, A.B.A. J., July 1985, at 61.

First, Senate Bill 453 forbids professional insurance carriers from excluding coverage of *Easton* liability from their policies.<sup>126</sup> Second, the trend away from the strict application of joint and several liability has manifested itself in California with the passage of Proposition 51.<sup>127</sup>

Pursuant to Proposition 51, "each defendant is liable for noneconomic damage[, e.g., opinion and suffering type awards,] only in direct proportion to the defendant's percentage of fault."<sup>128</sup> However, Proposition 51 will not shield brokers from potential liability under the doctrine of joint and several liability.<sup>129</sup> This is because Proposition 51 "affirms . . . joint and several liability for all economic damages,"<sup>130</sup> including property damage.<sup>131</sup> Nonetheless, the passage of Proposition 51 does indicate a desire for reform, and the effect of joint and several liability, on the realtor, may be a little less onerous in the future.<sup>132</sup>

## VI. CONCLUSION

From the ashes of "caveat emptor," *Easton* arose to establish a cause of action based on simple negligence in residential real estate transactions. Fortunately, *Easton* liability can be avoided in California if the guidelines in Senate Bills 453 and 1406 are followed. However, until brokers thoroughly familiarize themselves with both bills, the following disclaimer may be used:

This house is a wreck! What isn't broken either leaks, is eaten, is infested with wee beasties or rot. What isn't infested or leaking, sags or sways. The wind blows constantly through the walls, like water through a sieve. In addition, the ground is subject to imminent collapse from earthquakes or buried from landslide or inundation from any rain heavier than a light mist, rising creeks, backed up storm drains or bursting dams.

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126. See *supra* note 105 and accompanying text. Furthermore, Senate Bill 453 affirmatively states that a buyer has the duty to use reasonable care to protect himself. This will, in turn, cause a reduction in the amount of damages subject to joint and several liability by the percentage of the plaintiff's own negligence. For example, if Bob Buyer is 20 percent at fault for not observing an obvious landfill, then prospective damages of \$100,000 will be reduced by \$20,000 under principles of comparative negligence before joint and several liability takes effect. Therefore, if Sam Seller and Bruce Broker are jointly liable for the damage award and Sam Seller is insolvent, Bruce Broker will be accountable for only \$80,000.

127. As of July 1985, fourteen states have either limited or abolished joint and several liability. Granelli, *supra* note 125, at 61. States which have abolished joint and several liability are New Hampshire, Vermont, Kansas, and New Mexico. *Id.* at 62. States which have limited joint and several liability are Nevada, Texas, Indiana, Louisiana, Oregon, Pennsylvania, Iowa, Minnesota, and Oklahoma. *Id.*

128. Klien and Day, *Prop. 51 and The House that Tech-Bilt*, CAL. LAW. 25, 26 (Nov. 1986).

129. See generally P. PEYRAT, PROPOSITION 51: A FIRST ANALYSIS, (California Continuing Education of the Bar, Aug. 1986).

130. Gillies, *supra* note 3, at 19. See generally Klien and Day, *supra* note 128 at 26.

131. Klien and Day, *supra* note 128, at 26.

132. *Id.*

Purchasing this house will subject you to severe mental distress, emotional trauma and impotency. The end result will be that your marriage dissolves, your children will turn on you, you'll suffer a severe religious crisis and you may commit suicide.

ENJOY YOUR NEW HOME!!!<sup>133</sup>

GILBERT A. PARTIDA

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133. Caron, *supra* note 4, at 7.

## APPENDIX A

### REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF \_\_\_\_\_, 19\_\_\_\_. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

#### I

### COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: geologic hazard zones, creative financing, and structural alterations or additions).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same: \_\_\_\_\_

\_\_\_\_\_  
(list all other disclosure forms to be used in connection with this transaction)

#### II

### SELLERS INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller \_\_\_us \_\_\_is not occupying the property.

A. The subject property has the items checked below (read across):

<input type="checkbox"/> Range	<input type="checkbox"/> Oven	<input type="checkbox"/> Microwave
<input type="checkbox"/> Dishwasher	<input type="checkbox"/> Trash Compactor	<input type="checkbox"/> Garbage Disposal
<input type="checkbox"/> Washer/Dryer Hookups	<input type="checkbox"/> Window Screens	<input type="checkbox"/> Rain Gutters
<input type="checkbox"/> Burglar Alarms	<input type="checkbox"/> Smoke Detector(s)	<input type="checkbox"/> Fire Alarm
<input type="checkbox"/> T.V. Antenna	<input type="checkbox"/> Satellite Dish	<input type="checkbox"/> Intercom
<input type="checkbox"/> Central Heating	<input type="checkbox"/> Central Air Condng.	<input type="checkbox"/> Evaporator Cooler(s)
<input type="checkbox"/> Wall/Window Air Cndtng.	<input type="checkbox"/> Sprinklers	<input type="checkbox"/> Public Sewer System
<input type="checkbox"/> Septic Tank	<input type="checkbox"/> Sump Pump	<input type="checkbox"/> Water Softener
<input type="checkbox"/> Patio/Decking	<input type="checkbox"/> Built-in Barbeque	<input type="checkbox"/> Gazebo
<input type="checkbox"/> Sauna	<input type="checkbox"/> Pool	<input type="checkbox"/> Spa Hot Tub
<input type="checkbox"/> Security Gate(s)	<input type="checkbox"/> Garage Door Opener(s)	<input type="checkbox"/> Number Remote Controls
Garage: <input type="checkbox"/> Attached	<input type="checkbox"/> Not Attached	<input type="checkbox"/> Carport
Pool/Spa Heater: <input type="checkbox"/> Gas	<input type="checkbox"/> Solar	<input type="checkbox"/> Electric
Water Heater: <input type="checkbox"/> Gas		<input type="checkbox"/> Private Utility
Water Supply: <input type="checkbox"/> City	<input type="checkbox"/> Well	or Other _____

Exhaust Fan(s) in \_\_\_\_\_ 220 Volt Wiring in \_\_\_\_\_  
Fireplace(s) in \_\_\_\_\_ Gas Hookup \_\_\_\_\_ Insulation in \_\_\_\_\_  
\_\_Roof: Type: \_\_\_\_\_ Age: \_\_\_\_\_ (approx.)  
\_\_Other: \_\_\_\_\_

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? \_\_Yes \_\_No. If yes, then describe.

(Attach additional sheets if necessary.): \_\_\_\_\_

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? \_\_Yes \_\_No. If yes, check appropriate box(s) below.

\_\_Interior Walls \_\_Ceilings \_\_Floors \_\_Exterior Walls \_\_Roof \_\_Windows  
\_\_Doors \_\_Foundation \_\_Slab(s) \_\_Driveways \_\_Sidewalks \_\_Walls/Fences  
\_\_Electrical Systems \_\_Plumbing/Sewers/Septics \_\_Other Structural Components  
(Describe: \_\_\_\_\_)

If any of the above is checked, explain. (Attach additional sheets if necessary.): \_\_\_\_\_

C. Are you (Seller) aware of any of the following:

1. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property..... \_\_Yes \_\_No
2. Any encroachments, easements or simple matters that may affect your interest in the subject property ..... \_\_Yes \_\_No
3. Room additions, structural modifications, or other alterations or repairs made without necessary permits ..... \_\_Yes \_\_No
4. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes ..... \_\_Yes \_\_No
5. Landfill (compacted or otherwise) on the property or any portion thereof . ..... \_\_Yes \_\_No
6. Settling, slippage, sliding, or other soil problems ..... \_\_Yes \_\_No
7. Flooding, drainage or grading problems ..... \_\_Yes \_\_No
8. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides..... \_\_Yes \_\_No
9. Any zoning violations nonconforming uses, violations of "setback" requirements ..... \_\_Yes \_\_No
10. Neighborhood noise problems or other nuisances ..... \_\_Yes \_\_No
11. Homeowners' Association which has any authority over the subject property, CC&R's, or other deed restrictions or obligations ..... \_\_Yes \_\_No
12. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ..... \_\_Yes \_\_No
13. Any notices of abatement or citations against the property ..... \_\_Yes \_\_No
14. Any lawsuits against the seller threatening to or affecting this real property ..... \_\_Yes \_\_No

If the answer to any of these is yes, explain. (Attach additional sheets if necessary.): \_\_\_\_\_



Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller \_\_\_\_\_ Date \_\_\_\_\_  
Seller \_\_\_\_\_ Date \_\_\_\_\_

### III AGENTS INSPECTION DISCLOSURE

(To be completed only if any of the principals is represented by an agent in this transaction.)

BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY BY THE UNDERSIGNED AGENT IN CONJUNCTION WITH THAT INQUIRY, AGENT STATES THE FOLLOWING:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER(S) AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

Real Estate Broker \_\_\_\_\_

(Please Print)

By \_\_\_\_\_ Date \_\_\_\_\_

(Associate Licensee Signature)

### IV I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

Selling Broker \_\_\_\_\_

By \_\_\_\_\_ Date \_\_\_\_\_

(Associate Licensee Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE CONSULT YOUR ATTORNEY.

This form is taken from S. 1406, 1985-86 Cong. Sess., Cal. Laws at 1102.6.